with changing social and economic needs and hopes is committed, seemingly, to a program of positive social legislation. Without capacious sympathy with the purposes of this legislation and comprehensive understanding of the social will promulgating it, the lawyer will not be accorded his deserved dignity and authority. With an acute societal sensibility he may expect the responsibility that devolves in course upon the living successors of the historic molders of human institutions.[34]

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS. — Nearly two decades and a half ago one of our courts — seized of a prophetic mood — expressed the opinion that the protection of the right of contract and of subsisting contractual relations against the tortious interference of third parties is "a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century."[1] Events have certainly vindicated the prophecy. Most of the problems involved still remain unsolved, and many of them are just beginning to present themselves to the courts. Beginning with the clear recognition in *Lumley* v. *Gye*[2] of the interest of a party in a contractual relation as a right *in rem*, a right of property, which will be protected against intentional infringement by third parties, the courts have been groping along in a steady effort to evolve a logical and harmonious system for the securing of this property interest.[3] While some of the earlier cases suggested the limitation of the doctrine to contracts of employment,[4] it has been generally extended to include contract rights of every description.[5] And it may now be considered the established rule

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[34] See Learned Hand, "The Speech of Justice," 29 HARV. L. REV. 617, 618, 621.

[1] Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 231, 55 N. W. 1119 (1893).

[2] 2 E. & B. 216 (1853).

[3] Even Blackstone, however, speaking of two sorts of injuries to the rights of the master, growing out of the relation of master and servant, says (3 BL. COM. 142): "The one is, the retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. . . . Every master has, by his contract, purchased for a valuable consideration the services of his domestics for a limited time. The inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by special action on the case; and he may also have an action against the servant for the non-performance of his agreement. But if the new master was not apprized of the former contract, no action lies against him, unless he refuses to restore the servant upon demand. The other point of injury is that of beating, confining or disabling a man's servant, which depends upon the same principle as the last, to wit, the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of tresspass *vi et armis*. . . ."

[4] See Allen *v.* Flood, [1898] A. C. 1; Boyson *v.* Thorne, 98 Cal. 578, 33 Pac. 492 (1893).

[5] Quinn *v.* Leathem, [1901], A. C. 495; Walker *v.* Cronin, 107 Mass. 555 (1871); Morgan *v.* Andrews, 107 Mich. 33, 64 N. W. 869 (1895); Rice *v.* Manley, 66 N. Y. 82 (1876); Angle *v.* Chicago, etc. Ry. Co., 151 U. S. 1 (1893). *Contra*, Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57 (1891); Glencoe Land, etc. Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93 (1897).

of most jurisdictions that any contract right will be protected against the wilful, unjustifiable interference of third parties.[6]

The security given to this interest by the law, however, is by no means as yet consistent or complete. Thus, wherever the question has arisen, courts have denied a remedy for the negligent injury of a contract right, or for a loss proximately caused to the plaintiff through the medium of a contractual relation by the negligent act of a third party.[7] There seems an almost complete dearth of authority on the question of whether a person may recover for a loss occasioned by reason of a contract with or respecting another who has been wilfully injured by a third party.[8] An early Massachusetts case [9] denied a cause of action under these

[6] "That the wrongful and malicious interference by a stranger with contract relations existing between others, by causing one to commit a breach thereof, amounts to an actionable tort, is affirmed by nearly all the courts of the present day. The old rule that the remedy in such cases was an action against the party to the contract who committed the breach and not against the wrongful intermeddler, is not now the law, either in this country or in England. The rule has been extended and enlarged, and an action *ex delicto* against the mischievous wrongdoer is now sustained by nearly all the courts." Joyce *v.* Great Northern Ry. Co., 100 Minn. 225, 110 N. W. 975 (1907).

In the analogous cases of contributory infringement it has been held that one who sells an article merely knowing that the use to be made of it by the purchaser will violate a license agreement between the purchaser and the patentee will be enjoined. Thompson-Houston Electric Co. *v.* Kelsey Electric, etc. Co., 75 Fed. 1005 (1896); Tubular Rivet & Stud Co. *v.* O'Brien, 93 Fed. 200 (1898). See 23 HARV. L. REV. 230.

[7] Conn. Mutual Life Ins. Co. *v.* N. Y. & N. H. R. R. Co., 25 Conn. 265 (1856); Brink *v.* Wabash R. R. Co., 160 Mo. 87, 60 S. W. 1058 (1901); Remorquage A Hélice *v.* Bennetts, [1910] 1 K. B. 243. In the English case a tug belonging to the plaintiff was engaged under contract in towing a barge, when defendant's ship negligently collided with the tow, causing it to sink. The tug was not damaged. The court held that plaintiff could not recover for remuneration lost through the consequent impossibility of completing the towage contract. For a discussion of this case, see 24 HARV. L. REV. 397.

Similarly, the wife is given no separate cause of action against one who negligently injures the husband. Feneff *v.* N. Y. Cent. & H. R. R. Co., 203 Mass. 278, 89 N. E. 436 (1909); Goldman *v.* Cohen, 30 Misc. (N. Y.) 336 (1900). See Roscoe Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177, 194.

[8] Authority is not lacking, however, for a recovery by the master in the analogous case of a loss sustained by the master through the wrongful injury or imprisonment of his servant. Thus, in Woodward *v.* Washburn, 3 Denio (N. Y.), 369 (1846), a master was allowed to maintain an action on the case for the unlawful imprisonment of a servant hired by the year. The court said (page 371): "It is a principle of the common law, that where a person sustains a loss or damage, by the wrong of another, he may have an action upon the case to be remunerated in damages." Similarly, in Martinez *v.* Gerber, 3 M. & G. 88 (1841), where a servant was negligently injured by a third person, the master was allowed to recover from the tortfeasor for the added expense of employing another servant. See also FITZHERBERT'S NATURA BREVIUM, 91 G. (1616); Robert Marys's Case, 5 Coke, 201, 111 *b*, f. 113 *a* (1826); Evans *v.* Walton, L. R. 2 C. P. 615, 620 (1867); Fluker *v.* Ga. Railroad & Banking Co., 81 Ga. 461, 8 S. E. 529 (1889).

This doctrine, however, at least as set forth in the earlier cases, was intended to apply to no other relations, arising from mere contract, than that of master and servant. See Hart *v.* Aldridge, 1 Cowp. 54 (1774).

[9] Anthony *v.* Slaid, 11 Metc. (Mass.) 290 (1846). Here the plaintiff was under contract with a town to support at a fixed rate all the town paupers "in sickness and in health." Defendant's wife assaulted one of the paupers, thus putting the plaintiff to increased expense for his care and support. The court, speaking through Chief Justice Shaw, said: "It is not by means of any material or legal relation between the plaintiff and the party injured that the plaintiff sustains any loss by the act of the de-

circumstances. On the other hand in the recent case of *Niles-Bement-Pond Co.* v. *Iron Molders' Union*,[10] which raised a similar question, an opposite conclusion was reached by the federal court. In this case an Ohio corporation was under contract with a New Jersey corporation to furnish special machines. Union employees of the Ohio company went on strike, and by threats and the use of force prevented other employees of the company from working. No injury to the New Jersey company was intended or contemplated. To get into the federal courts on the ground of diversity of citizenship, suit was brought by the New Jersey corporation, rather than by the Ohio company, to enjoin the striking employees from interfering with the business of the latter company and thus preventing it from fulfilling its contract with the New Jersey corporation. The Ohio company was joined as a codefendant. The court granted an injunction, on the ground that the New Jersey corporation had a separate and independent cause of action against the wrongdoers for the injury to its contract right. The decision is rested upon an earlier federal case, *Chesapeake, etc. Agency Co.* v. *Fire, etc. Coke Co.*[11] Aside from this case there seems to be no clear authority in support of the decision.[12]

The reasons for the general denial of a cause of action to a party thus injured in his contract rights, or who has suffered a loss through the medium of a contractual relation with another, by the negligent or wilful tort of a third party, vary in different jurisdictions. Some courts seem to be influenced merely by a conservative aversion to any addition to existing causes of action.[13] Others scent a danger in the possibility of parties manufacturing contractual relations *inter se*, with an eye to increasing the recovery against a wrongdoer in the event of the commission

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fendant's wife, but by means of the special contract by which he had undertaken to support the town paupers. The damage is too remote and indirect. If such a principle be admitted, we do not see why the consequence would not follow . . . that in a case where an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper, the town might maintain an action, with a *per quod*, for damages. That there is no precedent for such an action where there must have been many occasions for bringing it, if maintainable, is a strong argument against it."

[10] 246 Fed. 851 (1917).

[11] 119 Fed. 942 (1902), aff'd, 124 Fed. 305 (1903). The lower court said (page 947): "It [complainant] has contractual relations with these defendant companies, and I can see no reason why it would not have a right of action against anyone who by a wrongful act should render these companies incapable of carrying out their contracts with it. . . . It makes no difference whether a man is wrongfully and maliciously induced to cease business relations with me or whether he is maliciously and wrongfully prevented from doing so. The effect is the same. The means in either case are wrongful, and in either case the wrongdoer is liable, in so far as the injury is the natural and probable result of the wrongful acts."

[12] But see Livermore *v.* Crane, 26 Wash. 529, 67 Pac. 221 (1901); and note 8, *supra*.

[13] See Anthony *v.* Slaid, *supra*. *Cf.* Ryan *v.* New York Central R. R. Co., 35 N. Y. 210 (1866). In the Ryan Case, the rather common attitude of many courts in denying a cause of action on the ground of remoteness of causation is well set forth as follows: "The novelty of the claim . . . where the occasion for its being made had been so common, is a strong argument against its validity. . . . It was Littleton's rule, 'what never was, never ought to be.' 1 Ver. 384 (1685). To sustain such a claim as the present, and to follow the same to its legitimate consequences, would subject persons to a liability against which no prudence could guard, and to meet which no private fortune would be adequate."

of a direct wrong to either party to the contract.[14] But what has probably influenced courts most in denying a cause of action in these cases is the apparent difficulty of properly apportioning damages between the party directly injured and the party indirectly injured, and the consequent danger of a double recovery for the same loss.[15]

The difficulty in the apportionment of damages, if the cause of action be allowed, is not altogether chimerical. It is confined, however, to a particular, though common, type of contractual relation. Thus in *Niles-Bement-Pond Co.* v. *Iron Molders' Union* the contract between the two companies contained no clause exempting the Ohio corporation from liability for breach of contract where caused by a strike or by the tortious interference of a third party. The recovery by the Ohio corporation in an action in tort against the strikers would therefore include, as an item in the total damage caused by the tortfeasors, the amount of its liability to the New Jersey corporation for the breach of contract.[16] If the New Jersey company is allowed a separate cause of action against the wrongdoers and pursues its remedy first, then in a subsequent suit by the Ohio corporation against the strikers the Ohio company's recovery should be reduced by an amount equal to that already recovered by the New Jersey company. On the other hand, if the Ohio company sues first and recovers its damages in full, to allow the New Jersey corporation subsequently to recover from the tortfeasors would submit them to a double liability for the same item of damage, with the possibility, however, of recovering back a part of the sum paid to the Ohio corporation. Since in such a case as this the party indirectly injured is generally sufficiently protected by his remedy on the contract,[17] to allow him a separate cause of action involves a needless multiplication of

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[14] Conn. Mutual Life Ins. Co. *v.* N. Y. & N. H. R. Co., 25 Conn. 265 (1856). At page 275 the court says: "To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more potentous than our jurisprudence has yet known."

[15] See Feneff *v.* N. Y. C. & H. R. R. Co., 203 Mass. 278, 89 N. E. 436 (1909).

Dean Pound in the article on "Individual Interests in the Domestic Relations," cited *supra*, discussing the analogous topic of the protection given to certain of the wife's interests in the marital relation, says (page 194): "Where these interests are infringed by physical injury to the husband or by abduction of the husband, a difficulty arises in that the husband has an action in which he may recover for diminution of his earning power, loss of earnings, and impairment of his ability to support those dependent upon him. The same problem arises in case of like interests of children. The reason for not securing the interest of wife or child in these cases seems to be that our modes of trial are such and our mode of assessment of damages by the verdict of a jury is necessarily so crude that if husband and wife were each allowed to sue, instead of each recovering an exact reparation, each would be pretty sure to recover what would repair the injury to both. Moreover, the injury to wife or child is very hard to measure in money. Hence, on a practical balancing of interests the wife is usually denied an action."

[16] See 1 SEDGWICK, DAMAGES (11 ed.), 142, 143. And see Castino *v.* Ritzman, 156 Cal. 587, 105 Pac. 739 (1909); Graves *v.* Baltimore & N. Y. Ry. Co., 76 N. J. L. 362, 69 Atl. 971 (1908).

[17] This, of course, is subject to the qualification that the quantum of damages recoverable in the contract action occasionally may differ materially from the quantum recoverable in the tort action.

actions. In these cases, therefore, the courts follow a sound instinct in denying him a cause of action.[18]

This type of case, however, is the exception rather than the rule. Commonly, contracts contain an exemption of liability for breach resulting from inability to perform caused by tortious acts of third parties, as where an ordinary strike-exemption clause is inserted. Such a clause was present in *Chesapeake, etc. Agency Co.* v. *Fire, etc. Coke Co.*, cited *supra*. To the rest of the world the promisee is entitled to performance, unhindered by the wrongful acts of third parties. But the promisor has a defense to an action for breach of contract. Damages recoverable by the promisor from the third party wrongdoer would not then include as an item of loss sustained a liability for breach of contract. Similarly in the ordinary contract of personal service illness will excuse performance by the employee. Yet one who tortiously causes such illness thereby unlawfully interferes with the employer in the enjoyment of a property right. In none of these cases does the difficulty of damages arise.[19]

It would seem, therefore, that no sufficient ground exists for the general denial in these cases of a cause of action to the party indirectly injured, — either in the case of a wilfully tortious act or of a merely negligent act by the third party. No valid distinction can be drawn between an intentional infringement of a contract right, such as occurred in *Lumley* v. *Gye*, and an injury proximately caused to the plaintiff by an intentional wrong to another. The law protects other property against both sorts of injury. Having recognized this interest as a right of property, and already securing it against direct, unjustifiable interference of third parties, a consistent body of law requires that this interest be accorded the same measure of protection that is accorded by the law to other property rights, no practical difficulties standing in the way.[20] Nor, it is submitted, can a distinction be made, in this connection, between a wilfully tortious act and a negligent act. Negligent conduct is as anti-social as wilfully injurious conduct. The interest of the community in the freedom of action of the individual tolerates the one no more than the other.[21]

Even if a cause of action at law is not allowed, it would seem that an injunction may well be granted to the party indirectly injured in such a case as *Niles-Bement-Pond Co.* v. *Iron Molders' Union*.[22] The interest

[18] Nor is the case of Lumley *v.* Gye entirely free from the difficulty as to damages. Obviously, if Lumley recovers from Gye in an action in tort and that judgment is satisfied, he cannot subsequently recover for the same damages in a suit against Miss Wagner for breach of contract. The satisfaction obtained from Gye in effect discharges, not merely his own liability in tort, but also Miss Wagner's liability in contract. The legal situation brought about by granting to Lumley a separate remedy against Gye thus results in the unmerited enrichment of Wagner. The same result follows, however, wherever satisfaction is secured from one of several joint tortfeasors, since the injured party has an action against each of the wrongdoers for the whole amount of damage, and yet there is no right of contribution *inter se*.

[19] Likewise, in a case like Conn. Mutual Life Ins. Co. *v.* N. Y. & N. H. R. R. Co., *supra*, no such obstacle is presented.

[20] See PIGGOTT, LAW OF TORTS, 363, 368. And see note 11, *supra*.

[21] See 27 HARV. L. REV. 689; POLLOCK ON TORTS (9 ed.), 22 *et seq.* But see O. W. Holmes, "Privilege, Malice, and Intent," 8 HARV. L. REV. 12.

[22] *Supra*.

of a party to a contract being recognized by the law as a property right and as such protected against some wrongful acts, equity, in giving a remedy to protect this legal right where no action is allowed at law, would merely be acting within the established scope of its concurrent jurisdiction.[23] An example of this sort of exercise of equity jurisdiction is the granting of an injunction to the remainderman to prevent the wanton destruction of the estate by the life tenant, without impeachment for waste, though no action exists at law for such an injury.[24] And, similarly, equity in protecting the *jus disponendi* of property by removing clouds upon title is securing an interest recognized by the law in cases where no remedy is given at law for the particular injury.[25] Finally, in such a case, it may be possible to view the right of action of the directly injured party, the Ohio company, against the wrongdoers, as held partly for the benefit of the promisee, the New Jersey corporation. An injunction might then conceivably be granted at the suit of the New Jersey corporation, joining the Ohio company as a codefendant, on analogy to a suit by a *cestui que trust* against a recusant trustee and a third party obligor to enforce an obligation held by the trustee for the benefit of the *cestui*.[26]

SOLDIERS' WILLS OF PERSONALTY. — The practice of exempting soldiers from the ordinary requirements concerning formalities in the making of testamentary dispositions had its origin in the Roman law. It was unknown to the republic, and was first introduced by Julius Cæsar.[1] It has continued in some form down to the present time, and still exists in the civil law.[2] The privilege made its first appearance in Anglo-American law in the Statute of Frauds,[3] was continued in the Wills Act,[4] and now exists in Canada [5] and most of the United States.[6]

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[23] See 27 HARV. L. REV. 668.

[24] Vane *v.* Barnard, 2 Vern. 738 (1716); Aston *v.* Aston, 1 Ves. 264 (1749).

[25] Gage *v.* Rohrbach, 56 Ill. 262 (1870); Sullivan *v.* Finnegan, 101 Mass. 447 (1869).

[26] See AMES, CASES ON TRUSTS, 67, note. As a prerequisite to such an action, the *cestui que trust* ordinarily must show that the trustee was requested to sue and failed to do so. Fletcher *v.* Fletcher, 4 Hare, 67 (1844); Gandy *v.* Gandy, 30 Ch. D. 57 (1885). Some courts, however, hold that mere neglect of the trustee to sue is sufficient. Kelly *v.* Larkin, [1910] I. R. 550. See Mason *v.* Mason, 33 Ga. 435 (1863).

The interests of the *cestui que trust* and of the recusant trustee are recognized as sufficiently distinct to give a federal court jurisdiction on the ground of diversity of citizenship, though the citizenship of the trustee and of the obligor are identical. Reinach *v.* Atlantic & G. W. R. Co., 58 Fed. 33 (1878).

[1] See *Ex parte* Thompson, 4 Bradf. Surr. (N. Y.) 154, 157 (1856). See also MUIRHEAD, ROMAN LAW (2 ed.), 320.

[2] France, CIVIL CODE, Art. 93, 981–98; Germany, DES REICHSMILITARGESETZES VOM 2 MAI, 1874, § 44. See Matter of Smith, 6 Phila. (Pa.) 104, 105 (1865).

[3] See 29 CAR. II, § 23.

[4] See 1 VICT. c. 26, § 11.

[5] British Columbia, 61 VICT. c. 193, § 9; Manitoba, REV. STAT. c. 150, § 8; New Brunswick, CONSOL. STAT. c. 77, § 6; Nova Scotia, REV. STAT. c. 89, § 8; Ontario, 1897, REV. STAT. c. 128, § 14.

[6] Anderson *v.* Pryor, 10 Sm. & M. (Miss.) 620 (1848); Van Deuzer *v.* Gordon, 39 Vt. 111 (1866). See 1 STIMSON, AMERICAN STATUTE LAW, § 2700; 1 REDFIELD, WILLS (4 ed.), 185.